



IN THE MATTER OF:

Complainant,

and

**MAYTAG CORPORATION d/b/a
HERRIN LAUNDRY PRODUCTS.**

Respondent.

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CHARGE NO: 2000SA0530
EEOC NO: 21BA01510
ALS NO: S-11621

IN THE MATTER OF:

RICHARD BURKS,

Complainant,

and

**MAYTAG CORPORATION d/b/a
HERRIN LAUNDRY PRODUCTS,**

Respondent.

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CHARGE NO: 2000SA0536
EEOC NO: 21BA01530
ALS NO: S-11639

These matters are ready for a Recommended Order and Decision pursuant to the Illinois Human Rights Act (775 ILCS 5/1-101 et seq.). A consolidated public hearing was held before me in Mt. Vernon, Illinois on April 16, 2003. Respondent has filed a post-hearing brief. Neither Complainant has filed a post-hearing brief although the time for doing so has expired.

In their Complaints, Complainants assert that they were discharged from their probationary positions as operators in Respondent's press room on account of their age.

Respondent, though, contends that both Complainants, who were 53 and 55 at the time they were hired, were probationary employees who were discharged due to poor work performance and negative attitudes.

Findings of Fact

Based on the record in this matter, I make the following findings of fact:

1. In September of 1999, Complainants Richard Burks and Sam Pedigo were hired as operators in Respondent's press room. As operators in the press room, both Complainants fabricated metal parts used for certain washers and dryers.

2. At the time of their hires, Burks was 55 years old and Pedigo was 53 years old. Brenda Holmes, age 49, hired both Complainants.

3. On September 27, 1999, Respondent hired Jarod Bennett, age 24, as an operator in its press room.

4. At the time of their hires, both Complainants, as well as Bennett, were serving 90-day probationary periods. Under Respondent's policy, both Complainant and Bennett were to receive a job evaluation every thirty days and would be eligible to receive union benefits/security on their jobs once they successfully completed their probationary periods.

5. At all times pertinent to this case, both Complainants and Bennett worked the third shift and were supervised in the press room by Ed Dibble, age 48.

6. At all times pertinent to this case, both Complainants and Bennett generally worked the same types of jobs in the press room. Both Complainants and Bennett were paid according to the number of pieces of product they made. Generally, Dibble issued job assignments to both Complainants and Bennett that required that they work individually on separate machines 50 percent of the time and work with others in a group effort the remaining 50 percent of the time. When the press room workers worked with others on a particular job, all workers on the job received the same amount of pay

for that job regardless of whether any particular worker worked faster than others in the group.

7. On October 8, 1999, Bennett received a job evaluation that rated his performance in three possible levels of “good”, “fair” or “poor”. Out of the 10 categories rated by Dibble, Bennett received eight “goods” and two “fairs” in the areas of job knowledge and safety habits. In the comment section of the evaluation, Dibble stated that Bennett needed more press room experience, and that he planned to assign Bennett on different jobs in the press room.

8. On October 8, 1999, Complainant Burks received a job evaluation in which Dibble rated Burks as “good” in four categories and “fair” in six categories of quantity of work, quality of work, job knowledge, safety habits, personal behavior/attitude, and dexterity. In the comment section Dibble observed that Burks needed to increase his production, and that he intended to work Burks in different areas of the press room.

9. Dibble did not issue Complainant Pedigo an initial written job evaluation after thirty days of employment, although he orally told Pedigo on occasions to speed up his production.

10. Throughout the tenures of both Complainants, Dibble received complaints from Bennett and co-worker Penny O’Connor about the production speed of both Complainants. Eventually, both Bennett and O’Connor requested that Dibble not assign them to jobs in which they would be working with either Complainant because in their view both Complainants were too slow in performing their portion of the job, and thus were costing them money. Dibble never received negative comments about Bennett’s rate of production from any of his co-workers.

11. At some point between September 1999 and November 30, 1999, Steve Watson, a lead worker in the press room overheard Complainant Pedigo say that

making money at Respondent's plant was not an important factor for him and that he was working for the insurance benefits. Watson passed along the comment to Dibble who interpreted the comment by Pedigo as an assertion that he would not speed up his production.

12. At some point between September 1999 and November 30, 1999 Watson received negative comments from O'Connor, Bennett and co-worker Bob Ward about the production speed of both Complainants. Watson passed these comments on to Dibble.

13. On November 30, 1999, Dibble told both Complainants to report to Holmes' office after their shift. When Complainants appeared at Holmes' office, Dibble gave Complainants a written job evaluation recommending that their employment not be continued, and Holmes individually told each Complainant that he was being terminated.

14. In the job evaluation given to Pedigo on November 30, 1999, Dibble rated Pedigo as "good" in one category (attendance), "fair" in four categories (quantity of work, safety habits, dexterity and dependability), and "poor" in five categories (quality of work, job knowledge, personal behavior/attitude, acceptance of supervision and acceptance of co-workers). In the comment section, Dibble wrote that Pedigo needed to increase his speed and willingness to work at the same rate as his co-workers. Dibble also observed that Pedigo had been told numerous times to speed up his production, and that co-workers informed him that Pedigo was only working for the benefits and that he was not going to work faster.

15. In the job evaluation given to Burks on November 30, 1999, Dibble rated Burks as "good" in one category (attendance), "fair" in five categories (quality of work, job knowledge, safety habits, acceptance of supervision and dexterity) and "poor" in four categories (quantity of work, personal behavior/attitude, acceptance of co-workers and dependability). In the comment section of the evaluation, Dibble wrote that Burks

needed to increase his speed and improve his attitude towards his job and co-workers, and that he needed to decide whether he wanted to work with the “group” and at Respondent. In recommending that Burks not continue his employment with Respondent, Dibble observed that Burks worked too slowly, that he displayed a poor attitude with respect to losing time or costing co-workers money, and that Burks was only interested in working for Respondent for its benefits.

16. On November 30, 1999, Bennett received a job evaluation from Dibble that recommended that his employment be continued at Respondent. In the evaluation Bennett received a “good” rating in all ten categories. Bennett eventually completed his probationary period and continued to work at Respondent as of the time of the public hearing.

17. From January 1999 through November 1999, Respondent terminated nineteen probationary employees in the areas of its plant supervised by Dibble. Out of the terminated employees, five (including Complainants) were over the age of forty, and fourteen were under the age of forty. During this same time period, Respondent terminated four employees (including Complainants) in the press room, who were over the age of forty and terminated six employees in the press room who were under the age of forty. Three of the terminated employees under the age of forty in the press room (Shon Ray Ashabranner [age 29], Amanda Bush [age 20] and Chris Robinson [age 25]) had been hired in the same September/October 1999 time frame as both Complainants.

18. Bennett, along with both Complainants, received paychecks for the following pay periods:

Date	Bennett	Burks	Pedigo
10/3/99	\$365.30	\$344.36	\$354.66
10/10/99	\$423.32	\$349.65	\$340.22
10/17/99	\$343.40	\$350.17	\$352.23
10/24/99	\$384.75	\$382.08	\$345.44
10/31/99	\$404.81	\$378.21	\$353.43

11/7/99	\$527.75	\$386.83	\$335.07
11/14/99	\$267.40	\$285.30	\$268.55
11/21/99	\$533.85	\$466.48	\$468.46
11/28/99	<u>\$262.83</u>	<u>\$261.13</u>	<u>\$215.01</u>
Total Pay	\$3,513.41	\$3,204.21	\$3,033.07

Conclusions of Law

1. Both Complainants are “employees” as that term is defined under the Human Rights Act.
2. Respondent is an “employer” as that term is defined under the Human Rights Act and was subject to the provisions of the Human Rights Act.
3. Complainants have failed to establish a *prima facie* case of age discrimination.
4. Respondent articulated a legitimate, non-discriminatory reason for terminating both Complainants.
5. Complainants failed to establish by a preponderance of the evidence that the reasons given by Respondent for its decision to terminate Complainants (i.e., poor production and attitude) were pretexts for age discrimination.

Determination

Complainants failed to prove by a preponderance of the evidence that Respondent violated section 2-102 of the Human Rights Act (775 ILCS 5/2-102) when it terminated them from their operator positions in its press room.

Discussion

In a case alleging discrimination based on age, the Commission and the courts have applied a three-step analysis to determine whether there has been a violation of the Illinois Human Rights Act. (See, for example, **Clyde v. Human Rights Commission**, 206 Ill.App.3d 283, 546 N.E.2d 265, 151 Ill.Dec. 288 (4th Dist. 1991), and **Orlet and Jefferson Smurfit Corporation d/b/a/ Alton Packaging Corporation**, 40 Ill.

HRC Rep. 363 (1988).) Under this approach, the complainant must first establish a *prima facie* case of unlawful discrimination by a preponderance of the evidence. Then, the burden shifts to the respondent to articulate a legitimate, non-discriminatory reason for its adverse action taken against the complainant. If the respondent is successful in its articulation, the presumption of unlawful discrimination is no longer present in the case (see, **Texas Department of Community Affairs v. Burdine**, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)), and the complainant is required to prove by a preponderance of the evidence that the respondent's articulated, non-discriminatory reason is a pretext for unlawful discrimination. This latter requirement merges with the complainant's ultimate burden of proving that the respondent discriminated unlawfully against the complainant. Of course, Complainants have not helped themselves in this burden since they have failed to file any post-hearing brief.

Respondent, in citing to federal precedent, initially argues that Complainants have not established a *prima facie* case of age discrimination because they cannot prove that they were performing their job satisfactorily or that they were replaced by substantially younger employees. However, the Commission, in **Battieste and C.E. Niehoff & Co.**, ___ Ill. HRC Rep. ___ (1989CF4075, November 14, 1995), discounted the need to establish satisfactory job performance or replacement by a younger individual as part of a *prima facie* case of employment discrimination since it observed that while an employee may not be performing satisfactorily in his or her job, an employer still could be motivated to discharge the employee based upon unlawful discrimination. (See also, **ISS International Service Inc. v. Illinois Human Rights Commission**, 272 Ill.App.3d 969, 651 N.E.2d 592, 209 Ill.Dec. 414 (1st Dist., 3rd Div. 1995).) Indeed, because Complainants contended during the public hearing that their alleged poor job performance equaled to that of a substantially younger individual (Bennett) whom Respondent eventually retained, satisfactory job performance or

replacement by a younger worker are not particularly relevant considerations for purposes of establishing a *prima facie* case of age discrimination in this matter.

Thus, the more appropriate *prima facie* case scenario is found in **Loyola University v. Human Rights Commission**, 149 Ill.App.3d 8, 500 N.E.2d 639, 102 Ill.Dec. 745 (1st Dist., 3rd Div. 1986) where the court recognized that the elements of a *prima facie* case of discrimination require a showing that: (1) the complainant is a member of a protected class; (2) complainant suffered a material adverse action; and (3) similarly situated co-workers who are not members of the protected classification were treated more favorably. Of course, the stumbling block for our Complainants is establishing that Bennett is similarly situated to them since the record suggests that: (1) Bennett was more productive in light of his greater take-home pay; and (2) no other co-workers complained to their supervisors about the productivity or attitude of Bennett. Thus, due to these differences, I find that Bennett is not a suitable comparative for purposes of establishing their age discrimination claims.

However, Respondent articulated at the public hearing that Complainants were terminated due their poor job performance and their attitude on the job. These articulations, on their face, provide me with a neutral, non-discriminatory reasons for Complainants' terminations, and I note that Complainants did not seriously contend at the public hearing that these articulations, if believable, would not be sufficient to satisfy Respondent's burden of production under **Burdine**. Thus, because the main function of the presentation of the *prima facie* case is to force Respondent into articulating reasons for their terminations, the only real question remaining in the instant case is whether Complainants have shown by a preponderance of the evidence that Respondent's articulations are pretexts for age discrimination. See, for example, **Clyde and Caterpillar Inc.**, 52 Ill. HRC Rep. 8, 10 (1989).

During the public hearing, both Complainants asserted that Respondent's claim that their work performance was substandard was pretextual since their work performance, as measured by the their paychecks, were generally consistent with the paychecks of Bennett whom Respondent retained. This would especially be true of Complainant Burks whose last three paychecks totaled \$1012.91, or within \$51.17 of the total of Bennett's last three paychecks.¹ But looking at pay stubs is not a particularly accurate way to determine who was the faster worker since, according to Respondents' rules, workers who teamed with others on a particular job received the same rate of pay for the whole job regardless of who finished their portions of the job faster, and the record indicated that Complainants teamed up with others for job assignments for approximately fifty percent of the time. Indeed, Complainants have no answer to the observation made by Steve Watson, a co-worker, that Bennett generally worker faster than Complainants in the assignments that he had observed.

Complainants, though, asserted at the public hearing that regardless of the productivity statistics, lack of productivity could not have been the real reason for their terminations since Dibble rarely observed them in the work setting. However, Dibble testified that he actually observed Complainants working in their job assignments and examined the productivity records after the end of each shift. Indeed, Dibble's testimony is supported by his mention in Burks' October 8, 1999 job evaluation that Burks had to increase his production. True enough, Dibble did not generate a job evaluation for Pedigo in October of 1999 so as to make a written record of his dissatisfaction with Pedigo's lack of productivity. Yet, Dibble testified that he told Pedigo many times that he wanted him to increase his productivity, and an examination of Pedigo's pay records suggest that he was generally performing at a lower level of productivity than Burks. In

¹ Complainant Pedigo did not fare as well, since his last three paychecks totaled \$952.02, or within \$112.06 of the total of Bennett's last three paychecks.

short, there is nothing in this record which would indicate that Dibble was actually satisfied with the level of production as to either Complainant so as to call into doubt his testimony that Complainants were terminated in part for productivity reasons.

But even if Complainants are correct that Bennett had no first-hand knowledge about their productivity, such a fact would still not boost their age discrimination claim since the record shows that Dibble received negative reports from others who had an ample opportunity to observe both Complainants' job performance. Specifically, Watson and Dibble credibly testified that they received complaints from Complainants' co-workers who indicated that both Complainants worked too slow and were costing them money because of their lack of productivity. Indeed, both Watson and Dibble recalled incidents where at least three of Complainants' co-workers voiced an opinion that they did not want to be assigned with either Complainant because of their lack of productivity. While it could be that the co-workers were wrong about Complainants' work habits or their productivity, neither Complainant has presented any evidence to doubt the sincerity of Dibble's belief that they were not working as fast as other co-workers and did not intend to increase their work speed.

Additionally, Respondent argues that Complainants were selected for termination because they demonstrated a poor attitude when they told others in the workplace that they were working only for the benefits provided by Respondent. Complainants insist that this explanation is suspicious because Holmes emphasized Respondent's benefits during their job interviews as a lure for them to accept the press room positions. However, Complainants misapprehend the focus of Dibble's quarrel with their stance since, according to Dibble, Complainants used the extensive nature of benefits as a reason not to raise the level of their productivity to make more money. Thus, it is understandable why Dibble would view negatively Complainants' statements about Respondent's benefits when his over-all goal was to have Complainants increase their

productivity. In summary, given that Dibble did not receive oral complaints either about Bennett's productivity or his attitude, it is understandable why Dibble recommended that Bennett be retained while also recommending that both Complainants be terminated.

Finally, I note that Complainants have not provided me with any other evidence indicating that age played a role in the decision to terminate them from their press room positions. Specifically, Respondent notes that during the same time frame as Complainants' employment it terminated more individuals younger than forty throughout the areas supervised by Dibble, and that it terminated three individuals in their 20's who were hired in September and October of 1999 and who also worked in the press room. These statistics hardly suggest that age discrimination played a factor in Complainants' terminations, and Complainants have not otherwise provided any rationale for either Holmes or Dibble to have suddenly harbored an age animosity towards either Complainant within sixty days of their hire.

Recommendation

For all of the above reasons, it is recommended that the Complaints and the underlying Charges of Discrimination of Sam Pedigo and Richard Burks be dismissed with prejudice.

HUMAN RIGHTS COMMISSION

BY: _____
MICHAEL R. ROBINSON
Administrative Law Judge
Administrative Law Section

ENTERED THE 15TH DAY OF JANUARY, 2004